

June 16, 2009

DECISION AND ORDER  
OF THE DEPARTMENT OF ENERGY

*Appeal*

Name of Petitioner: Power Wire Constructors

Date of Filing: May 27, 2009

Case Number: TFA-0312

On May 27, 2009, Power Wire Constructors (Appellant) filed an Appeal from a determination issued to it on April 15, 2009, by the Western Area Power Administration (WAPA) of the Department of Energy (DOE). In that determination, WAPA responded to a request for information the Appellant filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy in 10 C.F.R. Part 1004. In its determination, WAPA identified over 2,000 pages of documents responsive to the Appellant's request. WAPA withheld some of the responsive information under Exemption 5 of the FOIA. This appeal, if granted, would require WAPA to release the withheld information to the Appellant.

*I. Background*

On November 21, 2008, the Appellant submitted a FOIA request to WAPA for "daily reports, logs, notes, letters, e-mails, etc.," of specific WAPA employees. FOIA Request dated November 21, 2008, from Appellant to WAPA. On December 2, 2008, the Appellant amended its FOIA request to include similar documents from additional employees. FOIA Request Amendment dated December 2, 2008, from Appellant to WAPA.

WAPA conducted a search of its records and located over 2,000 pages of responsive documents.<sup>1/</sup> In an initial response, WAPA released 140 pages of responsive information to the Appellant. Determination Letter dated January 13, 2009, from WAPA to Appellant. On January 26, 2009, WAPA identified an additional 2,284 pages of responsive material.

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<sup>1/</sup>WAPA released 2,424 pages to the Appellant. Some of the documents consisted of one page; some of the documents consisted of numerous pages. WAPA marked the documents with consecutive page numbers for a total of 2,424 pages released to the Appellant. Because WAPA indicated that it redacted information from specific pages, rather than from specific documents, we will refer to page numbers in this Decision.

WAPA withheld portions of the pages claiming that those portions were shielded under Exemptions 5 and 6. Determination Letter dated January 26, 2009, from WAPA to Appellant. On March 9, 2009, the Appellant filed an Appeal, challenging WAPA's withholdings under both Exemptions. On March 30, 2009, this Office upheld the withholdings under Exemption 6, but remanded the matter to WAPA asking that it provide an adequate justification for withholding the information under Exemption 5. *Power Wire Constructors*, Case No. TFA-0297, (March 30, 2009).<sup>2/</sup> On April 15, 2009, WAPA issued a new determination explaining that certain specified pages contained information subject to the attorney-client privilege of Exemption 5 and that other specified pages contained information under the deliberative process privilege of Exemption 5. Determination Letter dated April 15, 2009, from WAPA to Appellant. On May 27, 2009, the Appellant filed the present Appeal, claiming that the attorney-client privilege does not apply because there is no pending litigation and

[t]he documents withheld by deliberative process should also be released if the investigation involves [Appellant] so we would be aware of any and all information pertaining to that investigation and as previously agreed to by [WAPA]. The information would not be released to general public, but would be used for informational purposes by [Appellant] alone.

Appeal Letter dated May 20, 2009, from Russ Wyant, President, Appellant, to Poli A. Marmolejos, Director, Office of Hearings and Appeals (OHA), DOE (May 20, 2009, Appeal Letter).

## II. Analysis

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b)(1)-(9). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b)(1)-(9). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1. The nine exemptions must be narrowly construed. *Church of Scientology of California v. Department of the Army*, 611 F.2d 738, 742 (9<sup>th</sup> Cir. 1980) (citing *Bristol-Myers Co. v. FTC*, 424 F.2d 935 (D.C. Cir.), cert. denied, 400 U.S. 824 (1970)). "An agency seeking to withhold information under an exemption to FOIA has the burden of proving that the information falls under the claimed exemption." *Lewis v. IRS*, 823 F.2d 375, 378 (9<sup>th</sup> Cir. 1987). In this regard, it is well settled that the agency's burden of justification is substantial. *Coastal*

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<sup>2/</sup>All OHA FOIA decisions issued after November 19, 1996, may be accessed at <http://www.oha.doe.gov/foia1.asp>.

*States Gas Corp. v. Department of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980) (*Coastal States*). Exemption 5 is at issue in this case.

## 1. Exemption 5

Exemption 5 of the FOIA exempts from mandatory disclosure documents which are “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with an agency.” 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts “those documents, and only those documents, normally privileged in the civil discovery context.” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (*Sears*). The courts have identified three traditional privileges, among others, that fall under this definition of exclusion: the attorney-client privilege, the attorney work-product privilege, and the executive “deliberative process” or “pre-decisional” privilege. *Coastal States Gas Corp. v. DOE*, 617 F.2d 854, 862 (D.C. Cir 1980) (*Coastal States*). The Appellant is challenging WAPA’s withholdings under the attorney-client privilege and the deliberative process privilege.

### a. Attorney-Client Privilege

The attorney-client privilege protects from mandatory disclosure “confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice.” *Mead Data Central, Inc., v. United States Dep’t of the Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977) (*Mead Data*). Although it fundamentally applies to facts divulged by a client to his attorney, the privilege also encompasses any opinions given by an attorney to his client based upon, and thus reflecting, those facts. *See, e.g., Jernigan v. United States Dep’t of the Air Force*, No. 97-35930, 1998 WL 658662, at \*2 (9<sup>th</sup> Cir. Sept. 17, 1998). The privilege also encompasses communications between attorneys that reflect client-supplied information. *See, e.g., Green v. IRS*, 556 F. Supp 79, 85 (N.D. Ind. 1982), *aff’d* 734 F.2d 18 (7<sup>th</sup> Cir. 1984) (unpublished table decision). Not all communications between attorney and client are privileged, however. *Clarke v. American Commerce Nat’l Bank*, 974 F.2d 127, 129 (9<sup>th</sup> Cir. 1992). The courts have limited the protection of the privilege to those communications necessary to obtain or provide legal advice. *Fisher v. United States*, 425 U.S. 291, 403-04 (1976). In other words, the privilege does not extend to social, informational, or procedural communications between attorney and client. *Government Accountability Project*, 24 DOE ¶ 80, 129 at 80,570 (1994).

Applying these criteria to the numerous document pages withheld by WAPA, it is apparent that these pages, with a few exceptions, consist almost entirely of communications between an attorney (WAPA General Counsel) and her client, WAPA, in which WAPA asks for, and receives legal advice about a legal matter. It is this type of communication that the privilege was designed to protect. In its Appeal, the Appellant claims that there is no anticipated litigation, and therefore, the attorney-client privilege does not apply. We disagree. Unlike the attorney work-product privilege, the attorney-client privilege is not limited to documents prepared in advance of litigation. *See, e.g., Mead*

*Data*, 566 F.2d at 252-53. Release of attorney-client communications would stifle frank and full discussions between the attorney and his client. With the exceptions noted below, we conclude that WAPA properly applied the attorney-client privilege in withholding portions of the document pages in question.

Nevertheless, our review of these document pages reveals that there are five pages that contain information that is informational or procedural in nature or is already public information. These portions are not exempt from mandatory disclosure under the attorney-client privilege and must therefore be provided to the Appellant. Specifically, pages 494, 495, 497, and 510 of the sequentially numbered documents provided are procedural in nature. Page 508 contains information that we believe is already public. It is possible that some of the information on page 508 may be withheld under Exemption 6,<sup>3/</sup> however, WAPA did not apply that exemption to this information. Therefore, we will remand the matter to WAPA to release pages 494, 495, 497, and 510 in full and to issue a new determination for page 508.

#### b. Deliberative Process Privilege

In order to be shielded by Exemption 5, a record must be both predecisional, *i.e.*, generated before the adoption of agency policy, and deliberative, *i.e.*, reflecting the give-and-take of the consultative process. *Coastal States*, 617 F.2d at 866. The predecisional privilege of Exemption 5 covers records that typically reflect the personal opinion of the writer rather than the final policy of the agency. *Id.* Consequently, the privilege does not generally protect records containing purely factual matters.

Notwithstanding the above, the FOIA requires that “any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.” 5 U.S.C. § 552(b). Thus, if a document contains both predecisional matter and factual matter that is not otherwise exempt from release, the factual matter must be segregated and released to the requester.

There are, however, exceptions to the general rule that factual information should be released. The first exception is for records in which factual information was selected from a larger collection of facts as part of the agency's deliberative process, and the release of either the collection of facts or the selected facts would reveal that deliberative process. *Dudman Communications. Corp. v. Dep't of Air Force*, 815 F.2d 1565 (D.C. Cir. 1987); *Montrose v. Train*, 491 F.2d 63 (D.C. Cir. 1974). The second exception is for factual information that is so inextricably intertwined with deliberative material that its exposure would reveal the agency's deliberative process. *Wolfe v. HHS*, 839 F.2d 769, 774-76 (D.C. Cir. 1988). Factual

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<sup>3/</sup>Exemption 6 exempts from disclosure “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6).

matter that does not fall within either of these two categories does not generally qualify for protection under Exemption 5.

WAPA listed numerous pages that had portions withheld because the information contained therein is predecisional and part of the deliberative process.<sup>4/</sup> We have been provided with copies of these pages. We have reviewed these pages and believe that all but one page were properly withheld under Exemption 5. These pages contain deliberative information that reflects the personal opinions of the authors. Release of this deliberative information could stifle honest and direct communication of federal employees' opinions. Further, the factual information contained in these documents is so intertwined as to make segregation virtually impossible. Additionally, withholding under Exemption 5 is appropriate because the factual information contained in these documents was selected from a larger quantity of factual information so that the selection of these facts would reveal some of the deliberative process. These documents were prepared by an advisor who reviewed many facts, but relied on only selected facts for these documents.

However, we believe that the information contained on page 813 is neither predecisional nor deliberative. It is possible that the information contained in this page may be withheld under Exemption 6, but we do not believe that the information can be withheld under Exemption 5. Therefore, we will remand this matter to WAPA for a another determination on page 813.

## **2. Segregability**

The FOIA requires that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). Thus, if a document contains both exempt information and non-exempt information that is not otherwise exempt from release, the non-exempt information must generally be segregated and released to the requestor. We have reviewed the information that WAPA redacted from the responsive information. WAPA was very careful with its redactions. We believe that none of the information that was redacted could be reasonably segregated.

## **3. Public Interest**

The DOE regulations provide that the DOE should release to the public material exempt from mandatory disclosure under the FOIA if the DOE determines that federal law permits disclosure and it is in the public interest. 10 C.F.R. § 1004.1. The Attorney General has indicated that whether or not there is a legally correct application of a FOIA exemption, it is the policy of the Department of Justice to defend the assertion of a FOIA exemption only

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<sup>4/</sup> In some instances, entire pages were withheld. In other instances, only portions of the pages were withheld.

in those cases where the agency articulates a reasonably foreseeable harm to an interest protected by that exemption. Memorandum from the Attorney General to Heads of Executive Departments and Agencies, Subject: The Freedom of Information Act (FOIA) (March 19, 2009) at 2. WAPA concluded, and we agree, that disclosure of the requested information would cause an unreasonable harm to WAPA's ongoing decision-making process. Further, with regard to the attorney-client material, given the strong public policy interest in protecting frank and independent discussion among those responsible for making governmental decisions and their advisors, we do not find that the public interest would be served by release of the attorney-client material. Therefore, release of the withheld information would not be in the public interest.

### *III. Conclusion*

Most of the information withheld by WAPA was properly withheld under Exemption 5. However, we believe that there are five pages that contain information that is not subject to the attorney-client privilege. In addition, we believe that there is one page that contains information that is not subject to the deliberative process privilege. Therefore, we will grant the Appeal in regard to those six documents and remand the matter to WAPA to release pages 494, 495, 497, and 510 and to issue another determination regarding pages 508 and 813. We will deny the Appeal in all other respects.

It Is Therefore Ordered That:

- (1) The Appeal filed by Power Wire Constructors, Case No. TFA-0312, is hereby granted as specified in Paragraph (2) below and is denied in all other respects.
- (2) This matter is hereby remanded to the Western Area Power Administration of the Department of Energy, which shall issue a new determination in accordance with the instructions set forth in the above Decision.
- (3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos  
Director  
Office of Hearings and Appeals

Date: June 16, 2009